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**IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO**

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

MOLYNDA BREWER,
Defendant-Appellant.

**MOTION FOR EXPEDITED REVIEW
OF CONDITIONS OF RELEASE**

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QUESTION PRESENTED

Defendant-Appellant Molynda Brewer is homeless and indigent, and has been detained since October 30, 2018, solely because she cannot afford to pay for court-imposed conditions of release. At the outset of this case, the state moved for pretrial detention on the ground that Ms. Brewer was a danger to the community, which the District Court rejected. But the District Court went on to impose conditions of release that function as unaffordable money bond: specifically, it ordered house arrest and GPS monitoring, even though Ms. Brewer undisputedly can afford neither housing nor the large fees associated with GPS monitoring. Did the District Court err in denying Ms. Brewer's motion to modify the conditions of release on the ground of indigency?

STANDARD AND TIMING OF REVIEW

The District Court's refusal to modify the conditions of release may be set aside if it "(i) is arbitrary, capricious, or reflects an abuse of discretion; (ii) is not supported by substantial evidence; or (iii) is otherwise not in accordance with law." NMRA 12-204(D)(2)(b). The Court must review this appeal "in an expedited manner." *Id.* 12-204(D)(2)(a). If the Court does not affirm the underlying order within

five days of the filing of this motion, it must order the state to file a response within five days, and then dispose of the appeal either within seven days of the response or, if no response is filed, within five days after the response was due. *Id.* 12-204(D)(1)(a)-(b), 12-204(D)(2)(a).

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION OF OPINION

This appeal concerns whether a defendant in a criminal case may be detained solely because she cannot afford to pay for nominally “non-monetary” conditions of release. This is a vital constitutional question that, to counsel’s knowledge, has not been addressed by any appellate court of this state. Given the importance of the rights at stake, counsel believes that the Court will benefit from oral argument, provided it can be scheduled within the expedited timeframe for this Court’s review, and that trial courts of this state will benefit from a published opinion.

FACTUAL BACKGROUND

Ms. Brewer was arrested on October 30, 2018 on charges that, while intoxicated, she threw a rock through a windshield and then, while being taken to a hospital for treatment, grabbed a paramedic’s

wrist and scratched it, leaving “some slight redness.” Exh. A (Criminal Complaint). She has been in jail ever since.

Ms. Brewer is undisputedly indigent. The state’s criminal complaint noted that she was homeless. *Id.* And on a screening form for indigent defense services, she indicated she qualified for food stamps and was unemployed, and listed no assets. Exh. B at 1 (Eligibility Determination for Indigent Defense Services.) The Magistrate Court’s screening agent found Ms. Brewer qualified for indigent defense services, *id.* at 2, a determination that has never been challenged.

Although Ms. Brewer was charged only with a misdemeanor and fourth-degree felony in the Magistrate Court, the state moved for pretrial detention without bail in the District Court for the Sixth Judicial District, contending that past criminal charges showed Ms. Brewer as a danger to the community. *See* NMRA 5-409(B) (authorizing filing of motion for pretrial detention in district court); Exh. C at ¶¶ 7-8 (Expedited Motion for Pretrial Detention). But at the hearing on its motion, the state admitted that it had dismissed felony charges in the prior cases, and that Ms. Brewer had previously been placed on unsupervised probation. Exh. D at 12:04-12:05, 12:20-12:28

(Nov. 5, 2018 Hr'g). At the end of the hearing, the District Court observed that “denying bail is a serious thing and is not a substitute for prosecution of cases.” *Id.* at 14:46-14:56. And while expressing its view that Ms. Brewer was an alcoholic and unlikely to be a law-abiding citizen, the District Court recognized that this was “not a basis for denying conditions of release.” Exh. D at 15:23-15:42 (Nov. 5, 2018 Hr'g); Exh. E at 2 (Nov. 5, 2018 Court Minutes). The state did not challenge the District Court’s denial of its motion for pretrial detention. *See* NMRA 5-405(A)(3)(b) authorizing state to appeal district court’s denial of motion for pretrial detention).

While denying the state’s motion, the District Court nonetheless imposed two conditions of release that are critical to this appeal. ***First***, the District Court ordered that Ms. Brewer be placed under house arrest and subject to a curfew—despite the fact that she has no residence. Exh. I (Order Setting Conditions of Release); Exh. D at 16:27-16:49 (Nov. 5, 2018 Hr'g). ***Second***, the District Court required Ms. Brewer to submit to GPS monitoring by the Grant County Surveillance Program—even though Ms. Brewer stated unequivocally that she could not afford GPS surveillance costs imposed by the

Program because “I have no money.” Exh. I at 3 (Order Setting Conditions of Release); Exh. D at 19:05-19:07 (Nov. 5, 2018 Hr’g); Exh. E at 2 (Nov. 5, 2018 Court Minutes). In response to this, the District Court stated, “Well, that’s a problem. If she can’t qualify for the surveillance program, then you need to come back. But that’s all I’m doing today with this.” Exh. D at 19:17-19:27 (Nov. 5, 2018 Hr’g); Exh. E at 2 (Nov. 5, 2018 Court Minutes).

Unsurprisingly, Ms. Brewer could not get out of jail under these conditions because, as she and her counsel made clear to the District Court, she could not afford them. So, on November 26, 2018, Ms. Brewer moved to modify her conditions of release. She noted that the District Court had imposed both house arrest and GPS monitoring, and flagged the high cost of GPS monitoring imposed by the Grant County Surveillance Program: a “start-up” fee of \$65 and a monthly fee of \$100. Exh. G at ¶¶ 1-3 (Motion to Review Conditions of Release). She argued that “imposition of a GPS requirement is tantamount to the imposition of a money-bond,” which she could not afford, and asked that the District Court modify the conditions of release “in order that she may be released from jail.” *Id.* ¶ 6 & Prayer for Relief.

Ms. Brewer's motion was heard three weeks later, on December 17, 2018. At the hearing, Ms. Brewer's counsel reiterated that the GPS monitoring was "tantamount to a bond that she can't pay." Ex. D at 20:07-20:09 (Dec. 17, 2018 Hr'g); Exh. H at 2 (Dec. 17, 2018 Court Minutes). The state, in response, characterized the conditions as "an unsecured bond"—notwithstanding that Ms. Brewer undisputedly lacked money to pay for them. *Id.* at 21:04-21:06.

Although the parties then agreed that Ms. Brewer would satisfy the house arrest condition if the Sierra House Women and Children's Transitional Center in Silver City would house her under her conditions of release, the District Court stated, "Well, I'm not going to release her without surveillance. You know, she's got a long history, and I don't think the conditions imposed by the Court are unreasonable." Ex. D at 21:42-21:52; Exh. H at 2 (Dec. 17, 2018 Court Minutes). At no point did the District Court consider waiving the fees associated with GPS monitoring, or whether other conditions of release would be satisfactory.

Ms. Brewer then personally told the District Court, "It's impossible for me to come up with the money, sitting in jail, for the

[GPS ankle] bracelet. If I take this house arrest . . .” Ex. D at 21:54-22:02. To this, the District Court simply said: “Well, I’ve made my ruling.” *Id.* at 22:02-22:04.

The District Court has never made “written findings of particularized reasons why . . . release w[ould] not reasonably ensure the appearance of” Ms. Brewer, *see* NMRA 5-401(B), and failed to issue any formal ruling on Ms. Brewer’s motion for nearly a month—until January 14, 2018—failing to act on multiple requests by counsel for a written order that could be appealed. Exh. I (Order on Defendant’s Motion to Review Conditions of Release). As a result, as of the filing of this motion, Ms. Brewer has sat in jail for nearly three months solely because she cannot afford her conditions of release.

ARGUMENT

I. IMPRISONING MS. BREWER BECAUSE SHE CANNOT BEAR THE COST OF CONDITIONS OF RELEASE VIOLATES ARTICLE II, § 13 OF THE NEW MEXICO CONSTITUTION.

The New Mexico Constitution has long provided that “[a]ll persons” except for capital defendants “shall . . . be bailable by sufficient sureties” and that “[e]xcessive bail shall not be required.” N.M. Const. art. II, § 13. This guarantee creates a broad presumption in favor of

pre-trial release. As the New Mexico Supreme Court held in *State v. Brown*, “[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.” 2014-NMSC-038, ¶ 53, 338 P.3d 1276, 1292. “Intentionally setting bail so high as to be unattainable,” the Court explained, “is simply a less honest method of unlawfully denying bail altogether.” *Id.*

Two years after *Brown*, New Mexico’s legislature and voters overwhelmingly reaffirmed and strengthened its holding by deciding that bail could not turn on a defendant’s financial means. With 91.5% of the legislative vote and 87.2% of the popular vote, the New Mexico Constitution was amended in 2016 to expressly state that “[a] person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.” N.M. Const. art. II, § 13.¹ In devising the Rule of

¹ See also 2016 Regular Session, SJR 1, N.M. Legislature, <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=JR&LegNo=1&year=16>; Official Results of Nov. 8, 2016 General Election, N.M. Sec’y of State, <http://electionresults.sos.state.nm.us/resultsSW.aspx?eid=84&type=SW&map=CTY>.

Criminal Procedure implementing this right, the New Mexico Supreme Court’s Ad Hoc Pretrial Release Committee recognized the right would be meaningless if unaffordable bond were imposed under the guise of fees for “non-monetary” conditions. As the Committee aptly observed, “detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.” NMRA 5-401 Cmte. Commentary.

The instructions of *Brown*, the voters, the legislature, and the Committee are clear: pre-trial release must not hinge on ability to pay. Absent an express finding that Ms. Brewer is a flight risk or danger to the community in the absence of bond—a finding the state asked the District Court to make, and which the District Court refused to do—the District Court had to order the least restrictive non-monetary condition or conditions of release available. N.M. Const. art. II, § 13.

Unfortunately, that did not happen here. The District Court required Ms. Brewer to obtain housing and pay high fees for GPS monitoring, even though both are undisputedly beyond her means. That is a money bond—no matter what the state or District Court call

it—and Ms. Brewer languishes in jail simply because she cannot pay for it. This is exactly what the New Mexico Supreme Court, the voters, the legislature, and the Ad Hoc Pretrial Release Committee sought to end. The conditions of release should be modified for this reason alone.

II. IMPRISONING MS. BREWER BECAUSE SHE CANNOT BEAR THE COST OF CONDITIONS OF RELEASE VIOLATES HER EQUAL PROTECTION AND DUE PROCESS RIGHTS UNDER THE UNITED STATES AND NEW MEXICO CONSTITUTIONS.

The United States Supreme Court has long recognized that a person may not be “subjected to imprisonment solely because of his indigency.” *Tate v. Short*, 401 U.S. 395, 397–398 (1971). This straightforward rule “reflect[s] both equal protection and due process” principles, *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996), both of which are reflected in the United States and New Mexico Constitutions, *see* U.S. Const. amend. XIV; N.M. Const. art. II, § 18.

Here, whether framed as a matter of equal protection or due process, Ms. Brewer’s imprisonment solely because she cannot pay for housing or GPS monitoring is impermissible. Under well-settled law, denying personal liberty based on lack of wealth is subject to heightened scrutiny. And that is a burden the state cannot meet, given

the many non-monetary options available for the state to protect its interests, and the wealth of evidence showing that monetary conditions of release do not actually serve those interests.

A. Ms. Brewer’s right to equal protection of the laws forbids jailing her based solely on her lack of financial resources.

1. Jailing Ms. Brewer because of her lack of financial resources creates a classification affecting the fundamental right to personal liberty.

Even when “a classification may not involve a suspect class, strict scrutiny is applied when the classification creates inequalities bearing on fundamental rights.” *State v. Rotherham*, 1996-NMSC-048, ¶ 21, 122 N.M. 246, 923 P.2d 1131; *see also Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2018 WL 424362, at *7 (N.D. Cal. Jan. 16, 2018) (“Strict scrutiny under the Equal Protection Clause applies where the classification impinges on a fundamental right *or* the classification itself is suspect.”) (emphasis in original). Ms. Brewer’s right to be free of confinement is undoubtedly a fundamental right. *Rotherham*, 1996-NMSC-048, ¶ 21 (confinement “impinges the right to liberty” and thus triggers strict scrutiny); *see also United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing “the importance and

fundamental nature” of “the individual’s strong interest in liberty”). This right is expressly enshrined in the New Mexico Constitution, which provides that “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights,” including the right of “enjoying and defending life and liberty.” N.M. Const. art. II, § 4.

Here, the District Court has imposed a classification that affects this right by keeping Ms. Brewer in jail solely due to her inability to pay for conditions of release. A non-indigent person in Ms. Brewer’s situation would be free at this point. Strict scrutiny therefore applies.

To satisfy strict scrutiny, the state would have to show that jailing Ms. Brewer because she cannot afford housing or GPS monitoring not only serves a compelling state interest, but is narrowly tailored to achieve that interest. *E.g., Griego v. Oliver*, 2014-NMSC-003, ¶ 39, 316 P.3d 865, 879. It cannot meet that burden. Even assuming the state’s interests in ensuring appearance and community are substantial, jailing Ms. Brewer because of her indigency does not advance those interests “by the least restrictive means available.” *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). The parties have already agreed that Ms. Brewer could move to transitional housing that is willing to

supervise her, and even if that option does not pan out, the District Court could ensure Ms. Brewer is monitored by ordering GPS tracking and waiving the associated fees.

Alternatively, the District Court could consider other conditions that do not require the imposition of fees. Indeed, the relevant Rule of Criminal Procedure expressly authorizes a condition of release that requires “report[ing] on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant,” NMRA 5-401(D)(6), and the District Court has already required Ms. Brewer to report to the Grant County Surveillance Program for regular drug and alcohol testing, *see* Exh. I (Order Setting Conditions of Release). More generally, the District Court can consider other non-monetary options under its broad power to impose “any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.” NMRA 5-401(D)(13).

At the same time, there is no reason to think that jailing Ms. Brewer for inability to pay for GPS monitoring and housing would somehow be more effective in meeting the state’s interests. On the

contrary, “[r]ecent rigorous, peer-reviewed studies have found no link between financial conditions of release and appearance at trial or law-abiding behavior before trial.” *ODonnell v. Harris Cty., Tex.*, 251 F. Supp. 3d 1052, 1152 (S.D. Tex. 2017), *aff’d in relevant part*, 892 F.3d 147, 162 (5th Cir. 2018); *see also* Claire M.B. Booker *et al.*, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* 12 (Pretrial Justice Institute, June 2014) (“The Jefferson County Bail Impact Study did not identify any public safety, court appearance, or compliance with supervision benefits to requiring defendants to post a secured money bond (cash-only or surety-option) before they were released.”); Arpit Gupta *et al.*, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Leg. Studies 471, 475 (2016) (“We find no evidence that money bail increases the probability of appearance.”). Ms. Brewer’s detention thus cannot survive strict scrutiny.

2. Jailing Ms. Brewer because of her lack of financial resources constitutes invidious wealth-based discrimination.

Even setting aside the fundamental rights at stake, jailing Ms. Brewer because of her lack of money constitutes invidious

discrimination based on wealth. The indigent are guaranteed equal protection of the laws “at all stages” of criminal proceedings, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion), and “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible,” *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc); see also, e.g., *Kolvek v. Napple*, 212 S.E.2d 614, 617 (W. Va. 1975) (recognizing that if appellant “was placed in jail because he was an indigent and could not furnish either a \$500 cash bond or a proper surety while a person who is not an indigent can avoid being placed in jail by merely furnishing the bond required, he has been denied equal protection of the law”). And although poverty, in most cases, is not a suspect class, wealth-based classifications are suspect where the indigent (1) “[are] completely unable to pay for some desired benefit” and (2) “as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

Both criteria are met here. Ms. Brewer is indigent and thus “unable to pay” for the GPS monitoring and housing that the District Court has required as conditions of release. *ODonnell*, 892 F.3d at 162.

And, as a result, Ms. Brewer is suffering “an absolute deprivation” of her “most basic liberty interests—freedom from incarceration.” *Id.*

Like classifications affecting fundamental rights, this type of wealth-based discrimination demands strict scrutiny. The United States Supreme Court, in rejecting criminal penalties that turned on a defendant’s wealth, has repeatedly held that the relevant state interests could “often be served fully by alternative means.” *Bearden v. Georgia*, 461 U.S. 660, 671–72 (1983); *see also Tate*, 401 U.S. at 399 (“There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest. . . .”); *Williams v. Illinois*, 399 U.S. 235, 244 (1970) (“It is unnecessary for us to canvass the numerous alternatives to which the State . . . may resort. . . .”). That is the language of strict scrutiny, which, again, demands the “the least restrictive means available.” *Bernal*, 467 U.S. at 219; *see also Frazier v. Jordan*, 457 F.2d 726, 727–28 (5th Cir. 1972) (applying strict scrutiny under *Tate*).

But even if intermediate scrutiny applies, jailing Ms. Brewer for inability to pay for GPS monitoring or housing is improper. *See ODonnell*, 892 F.3d at 161 (finding trial court did not err in striking

down, under intermediate scrutiny standard, differential treatment of misdemeanor defendants based on wealth). Under intermediate scrutiny, the government bears the burden of proving that the challenged practice “substantially relate[s] to an important government interest.” *Griego*, 2014-NMSC-003, ¶ 4 (quoting *Breen v. Carlsbad Mun. Sch.*, 2005–NMSC–028, ¶ 13, 138 N.M. 331, 120 P.3d 413). But as explained above, the available evidence shows that imposing unaffordable conditions of release does not improve appearance rates or community safety. *O'Donnell*, 251 F. Supp. 3d at 1152. Ms. Brewer’s imprisonment thus fails under intermediate scrutiny, too.

B. Ms. Brewer’s right to due process of law forbids jailing her based solely on her lack of financial resources.

Separate and apart from the constitutional guarantee of equal protection, Ms. Brewer has a substantive due process right to be free from imprisonment. “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Reflecting the “fundamental” nature of this right, it is a “‘general rule’ of substantive due process that the government may not

detain a person prior to a judgment of guilt in a criminal trial.”

Salerno, 481 U.S. at 749.

Accordingly, under substantive due process principles, Ms. Brewer may only be detained for inability to pay for GPS monitoring or housing when doing so would serve “a compelling governmental interest and [be] suitably tailored to serve that interest.” *Rotherham*, 1996-NMSC-048, ¶ 21; *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (pretrial detention conditions satisfy substantive due process “only if they [were] ‘narrowly tailored to serve a compelling state interest’”). In other words, strict scrutiny applies under due process principles. And as explained above, that is a burden the state cannot meet.

CONCLUSION

Ms. Brewer sits in jail—and has sat there for nearly three months—for one reason: the District Court requires her to pay for housing and GPS monitoring that she cannot afford. This violates the New Mexico Constitution’s guarantee of affordable bail and runs afoul of federal and state guarantees of equal protection and due process. The Court should therefore immediately order Ms. Brewer’s release and

instruct the District Court to eliminate or modify any unaffordable conditions of release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2019,
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I further certify that the body of this brief falls under the 11,000
word limit imposed by rules promulgated in this Court.

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